

No. 42892-0-II

COURT OF APPEALS  
DIVISION II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
31 DEPUTY 

STATE OF WASHINGTON

Respondent

vs.

RAYMOND CLAIR CONNOLLY

Appellant

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ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY  
The Honorable Barbara Johnson  
Superior Court No. 11-1-01022-8

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APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in disqualifying Juror #11.
2. The evidence was insufficient to convict Mr. Connolly on Counts 3-5.
3. The evidence was insufficient to convict on Counts 6-9.all the indecent exposure counts.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court abuse its discretion in disqualifying Juror 11 when there was no indication the juror had committed misconduct or otherwise had demonstrated unfitness to serve as a juror? (Assignment of Error 1)

2. Did the state present sufficient evidence that Mr. Connolly had viewed or attempted to view S.M.W. for the purposes of his sexual gratification? (Assignment of Error 2)

3. Did the state present sufficient evidence that Mr. Connolly had intentionally exposed himself to S.M.W.? (Assignment of Error 3)

4. Did the state present sufficient evidence that Mr. Connolly knew that wearing pajamas with a non-secured fly would affront or alarm S.M.W.?(Assignment of Error 3)

### III. STATEMENT OF THE CASE

#### A. Procedural History

Appellant Ray Connolly was charged by an information filed on June 21, 2011 with multiple sex offenses. He was charged with one count of child molestation in the second degree, RCW 9A.44.086, four counts of voyeurism, RCW 9A.44.115, and four counts of indecent exposure, RCW 9A.88.010. The indecent exposure counts were gross misdemeanors, because the state alleged that the victims were less than 14 years old at the time of the alleged crimes. The charging period for the voyeurism counts stretched more than a year, from June 1, 2010 to June 13, 2011. The charging period for the indecent exposure counts stretched from January 15, 2011 to April 15, 2011. The named victim in all of the counts was S.M.W., who was 14 years old by the time of the trial. A second juvenile was named as co-victim in Count II, one of the voyeurism counts.

#### Trial proceedings

Trial was held on September 12-14, 2011 before the Honorable Barbara Johnson and a jury. After the state had rested (and after the defense had rested) the state moved to exclude one of the jurors because he had indicated, belatedly, that he knew one of the witnesses, Michelle Fleishman, the mother of the complaining witness S.M.W. Juror #11, a Mr. Sarason, was a weekly breakfast patron at a Shari's Restaurant, and Ms. Fleishman had occasionally waited on him. Initially, the court denied

the state's motion to exclude the juror, but upon a motion to reconsider, struck the juror and seated one of the alternates. RP II 290-92.<sup>1</sup>

The jury returned a verdict of not guilty on Count I, but guilty verdicts on each of the other eight counts. RP II 324-329; CP 113, 114, 117,120,123,126,127-129. The jury found aggravating circumstances on the four voyeurism counts. RP II 326; CP 115, 116, 119, 121, 122, 124, 125.

### Sentencing Hearing

The conviction for four voyeurism counts yielded an offender score of 9, due to the tripling effect of the "other current offenses." The standard range was 43-57 months. The prosecutor requested an exceptional sentence of 86 months, which exceeded the statutory maximum of 60 months for the voyeurism counts. The prosecutor argued that this could be accomplished by running some of the counts consecutive to one another. RP II 338. Defense counsel asked for a sentence at the bottom of the standard range. RP II 341-442. The court rejected the prosecutor's request for an exceptional sentence, and instead sentenced Mr. Connolly to 57 months, the top of the standard range, and ran the misdemeanor counts concurrently with the sentence on the felony charges. CP 130-149. Mr. Connolly filed a timely notice of appeal. He remains in custody while this appeal is pending.

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<sup>1</sup> The verbatim report of proceedings is divided into two volumes with continuous pagination. RP I includes the first day of trial, and RP II includes the second day, the return of the verdicts, and the sentencing hearing, which was held on Dec. 9, 2011.

B. Trial Testimony

K.A.M.G., 14 years old at the time of trial, is the best friend of the complaining witness, S.M.W. They have known each other since the 7<sup>th</sup> grade, and often spent weekends at each other's houses. RP I 117-118. They did so more often in the summer. She thought S.M.W. and Ray Connolly got along well. She referred to Ray Connolly as "Peanut"<sup>2</sup>, which was apparently S.M.W.'s nickname for him. RP 119, 229.

During the summer of 2010, while K.A.M.G. and S.M.W. were getting ready to go swimming and were changing into their swimsuits, K.A.M.G. saw someone peeking through the heating vent which was on the wall connecting the bathroom to S.M.W.'s bedroom. She thought it was Ray Connolly because of his facial features and facial hair. RP I 122. At the time, the girls had only their swimming suit bottoms on. K.A.M.G. screamed and threw a pillow at the vent, and then told S.M.W. what she had seen.

She identified Exhibit 3 and 4 as photographs of the vent she was describing. RP I 137. Although one could not see through the vent at the angle the picture was taken, she testified a person could see through it if one was in the middle of the room. She thought it was Mr. Connolly because she saw facial hair, but acknowledged she did not get a close look. RP I 140. She did not suggest that S.M.W. talk to Mr. Connolly

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<sup>2</sup> The state's witnesses never explained the derivation of Mr. Connolly's nickname. He testified later that his first name was like "almond" and that one day S.M.W., while eating some peanuts, said to him, "here are some of your siblings." RP II 229.

because she did not think it was a big deal at the time. RP I 142. She never saw anyone peeking through the grate again. RP I 142.

Mr. Connolly would sometimes be the one to wake the girls up in the morning. Once in a while, his penis would be protruding out of his pajamas.<sup>3</sup> K.A.M.G. thought this had happened “like” 10-15 times. He never said anything sexual to them, nor did he do anything with his penis in her presence. RP I 124-126, 147. Nor did she or S.M.W. say anything to him about it. These incidents happened sometime after the day she thought she saw him looking through the vent at them. RP I 127.

The first time she remembered seeing Mr. Connolly’s penis was around Christmas of 2010. RP 143. She spent 50 nights at S.M.W.’s house between Christmas of 2010 and June of 2011, when the incidents were reported to the police. RP I 146. He always wore the same pajama bottoms each time she saw his penis. She could not tell why his fly was open. RP I 140-150. She believed Mr. Connolly to be circumcised. RP I 127.

K.A.M.G. did not tell any adults about either of these two incidents until June of 2011. She did not tell any adults sooner because she did not know how they would react. RP I 129.

S.M.W. was 14 years old at the time of the trial.<sup>4</sup> In the summer of 2010, she and her girlfriend were changing into swimsuits in the bedroom and her friend saw Ray Connolly’s face in the vent. Her friend said, “What are you looking at, Peanut?” They finished changing in the room’s closet.

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<sup>3</sup> The pajamas apparently had no zipper or buttons. RP I 143.

<sup>4</sup> Her birthday was April 6, 1997.

For a long time the vent on her side did not have a cover on it. She tried to keep the cover on with tape, but it kept falling off. Exhibit 3 was a photo of the vent as it was on the day of this incident, with the vent cover off. RP 161-162. On three other occasions, she saw someone looking through the vent. She could barely see who it was, because it was a "little hole", but it was Ray Connolly's face. These other times occurred when she was changing clothes. RP I 163. If she saw Ray's face, she would move to her closet. RP I 164. When she saw his face, it was sideways and low to the ground. RP I 193.

She put objects in front of the vent after she saw Ray's face, but she was told by her mother and Ray to move the objects out of the way of the vent. RP I 164-65. She was told to keep the vent open to let heat through it. RP I 193. Eventually, she moved her bed in front of the vent, and then did not see anyone's face through it anymore. RP I 164.

S.M.W. identified Exhibits 1 and 2 as photos of the vent taken from the bathroom's side. RP I 165. She admitted that exhibit 3, which she knew was taken by the police, did not allow a person to see through the vent to the bathroom beyond. RP II 189. She thought she could see the louvers of the vent cover on the bathroom side when looking at Exhibit 4, a different view of the vent taken from the perspective of her room. RP II 190-91.

S.M.W. testified once when she was taking a shower, she was unable to locate the shampoo, and left the shower to open the bathroom

door. She saw Mr. Connolly “crouched down” by the door. He walked away fast. She asked him where the shampoo and conditioner were and he found them for her. RP I 166. She did not know Mr. Connolly was nearby until she opened the door to the bathroom. RP II 198. This was a few months before June of 2011, when she made her complaint to the police. RP I 166.

S.M.W. testified that once when she was sleeping on the couch, she was waking up for school and she felt like her shirt was being lifted up. She did not know what was happened because she was asleep. RP I 167. She woke up and her shirt was down. Mr. Connolly was in her immediate vicinity.

It was common for her to engage in horseplay with Mr. Connolly, or tickle him. RP I 175. On one occasion she could remember, she jumped on his back so he could carry her inside. He reached back and was holding her on her butt. His hands were just holding her up. RP I 168. The prosecutor asked her if the officer who had taken her report had gotten a detail wrong on that part of her report, and she told the prosecutor that the officer had gotten that part wrong.<sup>5</sup> When they roughhoused, he never touched her private parts. RP I 185. She was the one who jumped on his back, and she had wanted him to take her into the house. RP I 186.

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<sup>5</sup> Without a defense objection, Officer Brock subsequently testified that S.M.W. had told her that Mr. Connolly had put his hand between her legs and had touched her vagina, while carrying her piggyback. RP II 211.

Mr. Connolly would normally wake her up in the morning and would come into her bedroom in his pajamas. They had a hole in front, like boxer shorts. His penis would be hanging out of his pajamas. This would happen 2-3 times a week during the school year after her 14<sup>th</sup> birthday. When prompted by the prosecutor, she testified that it was after Christmas when Mr. Connolly had gotten his new pajamas. Sometimes her friend K.A.M.G. would be there, or her other friend Kara Blake, her 14 year old step-sister. RP I 80, 172- 173. He had a number of different pajama bottoms and was hanging out of more than one of them. RP I 173.

Mr. Connolly never made any comment to her about his penis, and she never saw him touching his penis in any way, although one time she thought she saw him “like [sic] put it away.” She did not look at him and did not say anything to him about his state of undress. RP I 175. She did not think he was circumcised. RP I 175. He never had an erection, and never talked to her about anything sexual in nature, or about pornography. RP II 199-200.

The first adult she told about any of these events was her mom. She felt her mom did not care, so then she told her dad. He went over with her to K.A.M.G.’s house and told K.A.M.G.’s father, and then they called the police. RP I 177. She had wanted to get out of the house and live with her dad before she told anyone what had happened to her, but she did not make up the events just to go live with her dad. RP I 179.

S.M.W. said she had told her mom, Michelle Fleishman, about K.A.M.G.'s seeing Ray's face in the vent when they were changing into their swimsuits. Her mom thought they were lying about it, and it made her angry that her mom did not believe her. RP II 202-203.

Just before calling the police in June of 2011, S.M.W. had been grounded by her mom for getting into trouble with the police about vandalism. She had been grounded for about three weeks. RP II 202. The report to the police was three days after she had been grounded. RP II 204. She initially testified that she had told her mom about K.A.M.G.'s seeing Ray's face behind the vent after she had been grounded but retracted this when prompted by the prosecutor. RP II 204-205. She had not told her mom about things before the involvement of the police because she did not know what her reaction would be. RP II 205.

Kara Blake is S.M.W.'s 14 year old step-sister. RP I 80-81. About a year before S.M.W. said anything to the police, she told Kara out of the blue about something that made her uncomfortable about an adult. RP I 81-82. She did not want Kara to tell anyone else. After this announcement, S.M.W. developed more of an "attitude" regarding dyeing her hair and getting piercings. RP I 83. Kara herself had spent time at S.M.W.'s house for overnights, and had never seen anything unusual. She never saw Mr. Connolly's penis protruding from his pajamas. RP I 84-85.

Alfred Worley is S.M.W.'s father. RP I 89. She had asked to move in with him while she was fighting with her mom. RP I 92. When she first

made a “disclosure” to him, she was staying at his house for the weekend, they had not been talking about the topic of sexual abuse, and she was not in trouble with him at the time for anything. RP I 93. The disclosure was about “exposure” and “peeping.” After hearing what she had to say, he went to the home of K.A.M.G., and spoke with K.A.M.G.’s dad, and then with K.A.M.G. herself. K.A.M.G. then made a “disclosure of inappropriate behavior.” RP I 95.

Perry Houts is a Washougal police officer who responded to the call made by K.A.M.G.’s dad and Mr. Worley. After finding out that the allegations occurred in Camas, he called for a Camas officer. When Mr. Connolly arrived to pick up S.M.W., Houts stood by until it was determined by the police whether to let Mr. Connolly do so. RP 111-112. S.M.W. looked as if she had been crying and upset before his arrival. RP I 111.

Officer Katie Brock is the Camas police officer who responded to Hout’s call regarding which jurisdiction should conduct the investigation of S.M.W.’s complaint. RP II 210. She interviewed S.M.W., who was crying at times during the interview. RP II 211. Without objection from the defense, she testified that S.M.W. had told her that she thought Mr. Connolly had put his hand between her legs while carrying her piggyback style, and had touched her vagina. RP II 211. While she was doing the interview, Mr. Connolly arrived to pick up S.M.W. After consulting with

her sergeant, she told him S.M.W. would not be allowed to go home with him. RP II 212-213.

She spoke with Mr. Connolly that day to ask him if he knew why the police wanted to talk with him. He said it was “all over the neighborhood” that he had urinated on two girls. RP II 214.

Officer Brock asked if there was a vent connecting the bathroom to S.M.W.’s bedroom. She looked through it and could see into the bedroom. She took some photos from the perspective of the bathroom, and then went into the bedroom, moved the bed and could see light from the bathroom through the vent. RP II 216-17. However, the only checking she did for visibility was to see if one could see light in either direction. RP II 220. Mr. Connolly told Brock that Michelle Fleishman had taken the cover off the vent in S.M.W.’s room to see if she could see through it into the bathroom. RP II 220. He told Brock he had not looked through the vent at S.M.W., but possibly she had seen him using the toilet through the vent. RP II 221.

Mr. Connolly told Brock that he never intentionally touched S.M.W.’s butt, but might have done so accidentally when she jumped on his back. RP II 221. He never noticed his penis protruding from his pajamas when he woke up the girls, which he did 2-3 times a week . RP II 222. He recalled S.M.W. asking him where shampoo was once when she was showering and he showed her where it was. RP II 222 and 231-32.

Brock returned the next day for additional questions. Mr. Connolly again denied looking through the vent. The deformation in the slots in the vent was there when they originally moved into the house, which was a rental. RP II 223, 238. He had told S.M.W. not to put things in front of the vent so that heat could circulate. RP II 223.

Brock said Mr. Connolly told her he did not understand why the girls would make the accusations they had. He speculated S.M.W. might have said these things because she had gotten into trouble and had been grounded or because she might want to live with her dad instead of her mom. RP II 224. Mr. Connolly reiterated that he had never intentionally touched S.M.W. between the legs while carrying her on his back. RP II 224-225. He did not remember his penis protruding from his pajamas, but realized while making coffee that his penis was hanging out, and put it away. He did not think anyone had seen this since no one mentioned it to him. RP II 225. He told Officer Gonzalez, who was with Brock, that he did not know why he did not wear different pajamas once he noticed this was an issue. RP II 226.

Michelle Fleishman is S.M.W.'s mother. RP II 257. S.M.W. told her about Ray "exposing himself" about three weeks before the police were called about his in June of 2011. S.M.W. had also told her about Mr. Connolly allegedly looking through the bathroom vent, also about three weeks before the police were called. Both of these conversations were before S.M.W. was in trouble for vandalism. RP II 207-208.

After the state rested, and after a six line opening statement by defense counsel, Mr. Connolly took the stand in his own defense. RP II 226, 227. He had lived with Michelle Fleishman for about four years. S.M.W. lived with them during that period of time. He thought he had a good relationship with S.M.W. She was the one who coined the nickname “Peanut” for him. RP II 228-229.

While it was a common occurrence for him to give S.M.W. piggyback rides, he never touched her private parts while doing so. RP II 230. He denied trying to look through the bathroom door at S.M.W. while she was showering. He had been sitting in a chair located about three feet from the door watching TV. When she asked for help about the shampoo, he showed her where it was. RP II 231-32, 249. He also denied lifting her shirt to try to look under it. RP II 232-33.

Mr. Connolly identified exhibit 4 as a photo of the vent taken from the perspective of the bedroom, and at a lower angle toward the bathroom. RP II 233-34. The vent had not been modified or changed. One could not see through it to the bathroom. The screws meant to secure it to the wall no longer did so, at least on the bedroom side. RP II 237, 248. He had never used the vent to look from the bathroom to S.M.W.’s room. RP II 235, 237.

Mr. Connolly acknowledged that he owned several pairs of pajamas with “open flies” but did not intentionally walk around the house with his penis protruding, nor did he pull it out to impress or scare anyone.

RP 239. As he does not wear underwear to bed, he acknowledged the possibility that his penis had protruded on occasion. However, no one had mentioned this to him, other than one time when Michelle Fleishman had when they were alone. RP II 240-41.

On cross-examination, Mr. Connolly said he got along well with S.M.W. and K.A.M.G. RP II 244. He had told the police that it was possible the girls had seen him using the toilet through the heating vent connecting the rooms. RP II 247. He had asked S.M.W. not to put things in front of the vent, and that he had asked her to move things so that the heat was not blocked. RP II 247-48. He agreed it was possible that S.M.W. had noticed his penis protruding “dozens of times,” because he has three or four pairs of pajamas with flies that were not secured with a zipper or buttons. RP II 250-51. However, he had only noticed a problem with one pair. He did not consider himself well-endowed so he did not worry about protruding from his pajamas. RP II 252. If anyone had said anything to him, he would have done something about it. RP II 252.

Michelle Fleishman also testified in the defense case. Before her daughter S.M.W. had been grounded for vandalism, she had been grounded for lying to Michelle about her whereabouts. S.M.W. would tell Michelle she had been at her father’s, and Michelle would find out that he had not seen her all day. RP II 258. S.M.W. had denied doing the vandalism, and when Michelle found out she truly had, she grounded her

through the Fourth of July. RP II 259. She also lost her privileges. RP II 261. It was not the first time S.M.W. had been grounded. RP II 271.

Michelle had never seen any inappropriate physical contact between Mr. Connolly and S.M.W., and her daughter had never told her that she had been touched inappropriately. RP II 260, 262. Nor had K.A.M.G. or S.M.W. told her about seeing Mr. Connolly's penis protruding from his pajamas, until about three weeks before the police were called. RP 269, 271 Michelle had, however, seen this herself, and told him about it. RP II 269. She acknowledged that Mr. Connolly woke S.M.W. for school on the days Michelle was off, and that she would not know exactly what Mr. Connolly did in the bathroom when he was alone there. RP II 277-78.

S.M.W. told Michelle about the allegation that Ray Connolly had watched her through the bathroom vent about three weeks before S.M.W. was grounded over the vandalism incident. RP II 271. Michelle went to look herself, and could not see anything through the vent. RP II 275. Michelle also went to look at the vent the day the police called her about it. RP II 263. The cover was on and she took it off. When she had done so, she could not see into the bathroom from the bedroom. RP II 263. She then went into the bathroom, and looked from the bathroom toward the bedroom to see if she could see into the bedroom through the vent, but she still could not see anything. RP II 264. The condition of the vents had been the same since they had first moved into the house. RP II 264.

The state called Doug Norcross, an officer with the Camas Police department, as a rebuttal witness. He looked from the bathroom side of the vent, and by getting down on his hands and knees could see the bottom part of the bed in the bedroom through the grate. Exhibit 4 looked pretty much like what he could see from the other side, except that there seemed to be an electrical cord hanging down in the picture. RP II 287-88.

C. Exclusion of Juror #11

One of the jurors, Mr. Sarason, told the court through the bailiff that he realized he knew Ms. Fleishman because she worked as a waitress at a place where he had breakfast. RP II 278. When questioned, the juror said he did not know her by name, but knew her face since she was a waitress at Shari's. He did not think that knowing her would affect his ability to be a fair and impartial juror. RP II 282. He said he liked her but she was not a regular waitress, just one of the people there. RP II 283. He did not think he would give her any more credibility than any other witness because he did not really know her well. RP II 283. After hearing these statements, the court denied the prosecutor's motion to disqualify the juror.

However, when the prosecutor renewed the motion, the court granted the motion without hearing any further from the juror, citing as authority RCW 2.36.110. RP II 290-92.

#### IV. ARGUMENT AND AUTHORITY

- A. The trial court abused its discretion in disqualifying Juror 11 without a showing of misconduct or inability to serve as a juror.

Just after the defense had rested, but before closing arguments, the court heard a motion from the state to disqualify Juror 11, because he knew Michelle Fleishman, S.M.W.'s mother. The court properly took evidence from the juror about the depth of the acquaintanceship. The juror said Ms. Fleishman was a waitress whom he knew from a restaurant where he breakfasted once a week, but she was not his regular waitress and he did not even know her name. RP II 282-283. He indicated, when asked directly, that he did not know her well and that he would not find her testimony more credible based on the acquaintanceship. RP II 283. After hearing this testimony, the court denied the prosecutor's motion to disqualify the juror.

Subsequently, the state apparently renewed the motion to disqualify the juror. The court did not take any additional testimony. The court noted the request to disqualify the juror was unique in the judge's long experience as a trial judge. The court quoted RCW 2.36.110, but never indicated the juror had been involved in any misconduct. The court's only reason for disqualifying the juror was that he *might* be inclined to be biased in favor of Ms. Fleishman, who had testified both as a witness for the state and for the defense. RP II 290-92.

Several recent Supreme Court cases have discussed RCW 2.36.110 and the decision of a trial court to disqualify a juror. In the most recent cases, the motions to disqualify had arisen during the course of jury deliberations, so there was a danger that the disqualification could have the effect of coercing a verdict by eliminating a “holdout” juror. *State v. Depaz*, 165 Wn.2d 842, 204 P.3d 217 (2009); *State v. Elmore*, 155 Wn.2d 758, 123 P.3d 72 (2005). Both cases held that the standard of review for this type of decision is abuse of discretion.

A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). “A discretionary decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record.” *Id.* (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1955))).

The statute invoked by the trial court as authority for its decision, RCW 2.36.110 reads as follows:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

Previous Washington cases dealing with the statute, outside of the context of a “holdout” juror, have confronted cases where a juror was unfit

for service, either because she had been sleeping on the job<sup>6</sup>, *State v. Jordan*, 103 Wn. App. 221, 11 P.3d 866 (2000), or because the juror had affirmatively informed the court she could not be fair to both parties after hearing the evidence. *State v. Hopkins*, 156 Wn. App. 468, 232 P.3d 597 (2010). Neither situation is presented under the facts of this case.

In *Depaz*, when the motion for disqualification was made during jury deliberations, the misconduct alleged was that the juror had discussed the state of deliberations with her spouse. The court noted that notwithstanding this showing of misconduct, this did not necessarily indicate that she had been improperly influenced or was unable to continue to deliberate. The Supreme Court reversed the conviction and remanded for a new trial.

There was simply no basis for the trial court to conclude in this case that the juror had manifested unfitness due to bias. There had certainly been no showing of juror misconduct. The juror had volunteered that he knew Ms. Fleishman, whom he did not know by name, after he saw her testify. He admitted she had been his server at the restaurant, but denied this was any kind of frequent occurrence. He specifically said the acquaintanceship would not affect his ability to evaluate her credibility. The state offered no evidence from other jurors that Juror 11 was unfit or biased in favor of the defense, or that he had made statements showing he

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<sup>6</sup> The juror in *Jordan* had been observed appearing very drowsy over the course of several days, and the observations were corroborated by several different witnesses.

intended not to follow the court's instructions. In short, there was no evidentiary basis for the court's abrupt decision to reverse its earlier ruling denying the challenge to the juror. This court should hold that the trial court abused its discretion in disqualifying the juror, vacate the conviction, and remand for a new jury trial.

B. The evidence was insufficient to convict Mr. Connolly of voyeurism in Counts 3-5.

The state charged Mr. Connolly with four separate counts of voyeurism in Counts 2-5. In Count 2, he was charged with viewing both S.M.W. and K.A.M.G.. In the other counts he was charged with viewing S.M.W. only. This challenge is to the last three counts.

In order to sustain a conviction, the state must prove every element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The standard of review when a challenge to the sufficiency of the evidence is made on appeal is whether a rational trier of fact could have found all of the elements of the crime beyond a reasonable doubt, giving the benefit of the inferences from the evidence to the non-moving party, the state. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Hoffman*, 116 Wn. 2d 51, 82, 804 P.2d 577 (1991); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

To convict Mr. Connolly of voyeurism, the state had to prove that he knowingly viewed (a) Another person (b)(1) without that person's knowledge and consent while the person being viewed, Or(b)(2) in a place

where he or she would have a reasonable expectation of privacy; and (c) the viewing was done for the purpose of arousing or gratifying the sexual desire of any person. Alternatively the state could try to prove that the viewing was of the intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place, again with the requirement that the viewing be done for the purpose of arousing or gratifying the sexual desire of any person.

The state's evidence on count 2 was that K.A.M.G. said she saw what she thought was Mr. Connolly's face behind the grate of the heating vent which connected the bathroom and S.M.W.'s bedroom, at a time when the two girls were changing into their swimsuits and had only their swimsuit bottoms on. According to S.M.W.'s later testimony, K.A.M.G. had said at the time, "What do you think you are looking at, Peanut?"

The evidence of whether a person could see anything at all through the grate was conflicting. The first officer, Officer Brock only checked to see if she could see light from the other room coming through the grate. The state's rebuttal witness, Sgt. Norcross, said that by getting down on his hands and knees in the bathroom, he could see the bottom of the bed in the bedroom. Both Mr. Connolly and Ms. Fleishman said that a person could not see into the bedroom while looking through the grate. All of the photographic evidence supported the defense testimony, although admittedly none of the photos were shot with the camera aperture flush

with the grate itself to capture that view. Assuming *arguendo* that one could see through the grate, the evidence was still insufficient to convict on Counts 3-5.

The evidence on Counts 3-5 was more generic and far weaker. Unlike Count 2, where an inference could be drawn that Mr. Connolly had possibly viewed the intimate areas of the girls, since K.A.M.G. said they only had their swimsuit bottoms on when she saw the person on the opposite side of the vent, in Counts 3-5 the only evidence about S.M.W.'s attire was that she was "dressing". There was thus no evidence from which a jury could infer that *if* there was a way to view her bedroom through the vent, the viewer would see S.M.W.'s intimate areas.

There was also no evidence which proved that *if* Mr. Connolly had been able to see through the grate, and had either viewed S.M.W.'s intimate areas or viewed her in an area in which she had an expectation of privacy, that he had done so for the purpose of arousing or gratifying his sexual desire.

In two Washington cases which interpret this statute, there was direct evidence of this element which is lacking in the present case. In *State v. Diaz-Flores*, 148 Wn. App. 911, 918-20, 201 P.3d 1073, *review denied*, 166 Wn.2d 1017 (2009), there was testimony that the person watching a couple through their window had his zipper open, it appeared he had an erection, his hands were in his crotch area, and he put them in his pockets when he heard the officers approaching. In another case, *State*

*v. Glas*, 106 Wn. App. 895, 904, 27 P.3d 216 (2001), *rev'd on other grounds*, 147 Wn.2d 410, 54 P.3d 147 (2002), the defendant took “up-skirt” photographs at a mall and admitted they were destined for a pornographic internet web site. There was no such admission nor direct evidence of sexual purpose in the present case.

Although the jury was apparently considering whether the incident involving the shampoo and the shower were a basis for one of the voyeurism counts,<sup>7</sup> the evidence from this incident was clearly insufficient, since there was no evidence Mr. Connolly had actually viewed S.M.W. through the bathroom door, nor evidence that the shower permitted a view of her intimate areas in the event that the bathroom door had not been opaque. His response to her request for help finding the shampoo also is at odds with a sexual purpose. Similarly, there was not sufficient evidence from which the jury could conclude Mr. Connolly had viewed S.M.W. in the “shirt lifting” incident, since she admitted she was asleep, and her shirt was down when she awoke, and Mr. Connolly was merely in her vicinity, as he would have to be to awaken her for school. The court should reverse and dismiss Counts 3 through 5, and remand for resentencing since those counts had a significant effect on Mr. Connolly’s standard range.

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<sup>7</sup> The jury sent out a note inquiring about the need to find separate incidents on each of the voyeurism counts. CP 74.

3. There was insufficient evidence of intent for Counts 6 through 9.

In order to convict Mr. Connolly on Count 6 through 9, the state had to prove that he had intentionally made an open and obscene exposure of his person, knowing that such conduct is likely to cause reasonable affront or alarm. The evidence was insufficient in this case to show that Mr. Connolly intentionally exposed himself, and was likewise insufficient that he knew his conduct would cause reasonable affront or alarm.

The state's evidence showed that during the times of the alleged exposures, Mr. Connolly was clothed in ordinary pajamas, which were not designed with a zipper or button type fly. There was no evidence that he ever disrobed in front of S.M.W. or K.A.M.G.. They had never seen him handle himself in a sexual way. The only time S.M.W. thought he might be touching himself was when he was putting his penis more out of sight. Both girls said he never discussed anything sexual with them, and that they never mentioned to him that he was protruding. Neither said he ever had an erection when he came into the bedroom to wake them up. The two girls had differing opinions on whether he was circumcised or not, which suggests that the protrusion was minimal at most. The state never elicited any testimony about how far his penis protruded.

Mr. Connolly testified that he never intentionally exposed himself to the girls, and that neither had ever mentioned anything to him about being uncovered. He acknowledged on cross examination that he could

have protruded on a number of occasions, given the similarity of his pajama bottoms and the absence of comment from anyone but Michelle Fleishman, on one occasion.

Intent cannot be inferred from a vacuum. Unlike cases where defendants were frankly masturbating, *State v. Steen*, 155 Wn. App. 243, 228 P.3d 1285 (2010) or were partially or full undressed and thus fully exposed, *State v. Vars*, 157 Wn. App. 482, 237 P.3d 378 (2010)(three hour period, 15 block area while nude) there was no evidence in this case from which a jury could infer intent. Additionally, the absence of comment by the girls to Mr. Connolly suggests a minimal protrusion, which is itself indicative that Mr. Connolly's conduct was not intentional, and also that it did not affront or alarm them. This court should reverse and dismiss Counts 6 through 9.

#### V. CONCLUSION

The trial court erred in disqualifying Juror 11 based on the mere fact that he was casually acquainted with a witness who testified for both parties. The juror had not committed any misconduct, had not indicated an inability to deliberate impartially, and had, when directly asked, stated that knowing the witness casually would not have any effect on his credibility determination. The court abused its discretion in disqualifying the juror since none of the statutory bases for doing so were met on the record in this case. This court should vacate the convictions and remand for a new trial on the basis of this trial error.

The court should reverse and dismiss the convictions for Counts 3 through 5, the voyeurism counts. The evidence on these three counts did not demonstrate that Mr. Connolly had viewed S.M.W.'s intimate areas, and there was no additional evidence to support the element that he had done so with the requisite sexual intent.

Finally, the court should reverse and dismiss the convictions for Counts 6 through 9, the indecent exposure counts. The state did not prove beyond a reasonable doubt that any protrusion was intentional, since Mr. Connolly was fully clothed (albeit in pajamas) on all the occasions when the state's witnesses claimed he was exposed. The absence of evidence of sexual context ( no masturbation, no observation of an erection, no discussion of sex) also demonstrates any exposure that took place was accidental or inadvertent. The absence of comment or complaint by the state's witnesses also demonstrates the absence of evidence to support the element of knowing that exposure would cause affront or alarm.

For all of the above reasons, the court should reverse Mr. Connolly's convictions and remand for a new trial, absent the counts for which there was insufficient evidence.

Dated this 13 day of MARCH, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of: Appellant's opening brief, upon the following attorney of record and the Defendant at the addresses shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the 13<sup>th</sup> day of March with postage fully prepaid.

DATED this 13<sup>th</sup> day of March, 2012

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